date of entry of the supplemental decree] * * *." The sale was to be made not earlier than October 24, 1953. This order of sale or judgment was made August 6, 1953, and entered August 10, 1953.

Thereafter, the United States made a motion to the district court to delete from the order of sale or judgment, the inclusion of interest on the unpaid sums, upon the ground that:

"* * * the judgment herein as entered [the April 6, 1951, judgment] does not require the payment of interest, and interest is not recoverable herein in any event."

The court denied the motion as made, but ordered the supplemental decree to be modified so as to require interest to run from October 6, 1951, the end of the six-month period in which the fees were payable, without resort to sale of the land. The last referred to order (modifying the order of sale) was made October 26, 1953, and entered November 10, 1953. No appeal was ever taken from this order.

Subsequently, and before public sale of the property, private sale of certain portions of the property was made, and by stipulation and court order the cash proceeds were deposited in the registry of the court, subject to the same lien as was impressed on the land.

Appellee Preston petitioned the district court for an order of payment, out of the money in the court's registry, of the interest and costs involved (together with advances made in another action which will be later clarified) and, after the issuance of a show-cause order, a hearing, and the findings of fact and conclusions of law, the court approved by its judgment dated August 21,

1954, and entered August 23, 1954. It is from this latter judgment that the instant appeal by the United States and Lee Arenas is taken as to the items of interest and the advances in the other action.

It is the contention of the appellee that the basis of the ruling, on the inclusion of the interest and costs in the judgment, is the order of sale made October 26, 1953, and entered November 10, 1953, from which no appeal was ever taken, and that the inclusion of interest and costs became *res judicata* thereby.

To this contention little defense is made but appellant United States says in its brief (and Arenas advances the same idea):

"Since the suit involved restricted Indian land it was a suit against the United States and the court's power was limited to the extent of the consent of Congress. Congress had not permitted the imposition of interest. Therefore the order or judgment attempting to charge interest against the fund was more than erroneous—it was void. United States v. United States Fidelity [& Guaranty] Co., 1940, 309 U. S. 506, 514 [60 S. Ct. 653, 84 L. Ed. 894]; United States v. New York [Importing] Rayon Co., 1947 329 U. S. 654, 658-663 [67 S. Ct. 601, 91 L. Ed. 577]; United States v. Shaw, 1940, 309 U. S. 495 [60 S. Ct. 659, 84 L. Ed. 888]; Tillson v. United States, 1879, 100 U. S. 43 [25 L. Ed. 543]; Carr v. United States, 1878, 98 U. S. 433 [25 L. Ed. 209]. Consequently, whether or not appealed from, the order of November 10, 1953, was without effect."

Unquestionably, the suit is, in nature, against the United States. In the case of United States v. New York Rayon Importing Co., 1947, 329 U. S. 654, 658, 67 S. Ct.

601, 603, 91 L. Ed. 577, the United States Supreme Court (after referring to §177(a) of the Judicial Code wherein the awarding of interest is specifically proscribed in suits before the Court of Claims unless upon a contract expressly stipulating for the payment of interest) says:

"* * * [T]his provision codifies the traditional rule regarding the immunity of the United States from liability from interest on unpaid accounts or claims. In other words, in the absence of constitutional requirements, interest can be recovered against the United States only if express consent to such a recovery has been given by Congress. * * * The consent necessary to waive the traditional immunity must be express, and it must be strictly construed. Tillson v. United States, 100 U. S. 43, 25 L. Ed. 543; United States v. Thayer-West Point Hotel Co., *supra* [329 U. S. 585, 67 S. Ct. 398, 91 L. Ed. 521]."

The principle is applied in Anglin & Stevenson v. United States, 10 Cir., 1947, 160 F. 2d 670, a case strikingly similar to the instant case. See Huntley v. Southern Oregon Sales, 9 Cir., 1939, 104 F. 2d 153.

And it was said in United States v. United States Fidelity & Guaranty Co., 1940, 309 U. S. 506, 514, 60 S. Ct. 653, 657, 84 L. Ed. 894:

"Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review [as in our case by not appealing from the order of November 10, 1953] cannot give force to this exercise of judicial power."

Appellee, however, argues that the sale of certain of the lands and the payment of the proceeds into the court's registry worked a redemption of the lands from the lien.

But the sale and the payment into court occurred under agreement of all parties with and under the stipulation that the money would be under the same restrictions as the land.

If, as it seems to us we must do, we hold that the failure to appeal from the November 10, 1953, order modifying the "Order for Sale of Real Property to Satisfy Supplemental Judgment and Decree" which was in essence a modifying order of the supplemental judgment, it leaves the matter of interest on the allowed attorney fees beyond attack as *res judicata* if the court had jurisdiction to allow the interest. If the court was without jurisdiction, its action was void as to the allowed interest, and we have just held it to be; therefore, the order was of no effect and it did not and could not be held as *res judicata* upon the item of interest.

It follows, therefore, that when in compliance with appellee's petition for distribution of the accumulated interest, the court ordered interest paid out of the trust fund in the court's registry, nothing stood in the way of an appeal by the United States and Arenas upon the ground that the order was void.

We hold that the appeal from the order directing the distribution of interest upon the sum fixed as attorney fees was proper and that the order in that particular was and is void.

In the long litigation concerning the right and extent of the right to allotment of lands to Lee Arenas, an action was brought by him in which Eleuteria Brown Arenas and the United States were defendants. Eleuteria was an adopted daughter, under tribal custom, of Lee and Guadaloupe Arenas, Lee's wife. In the prosecution of this suit, appellee Preston at the request of Lee Arenas

advanced the sum of $468.19 as expenses in the suit and the court ordered this sum paid to appellee Preston out of the funds on deposit in the court's registry. There can be no question as to the right of appeal on this item, since it is not mentioned in the original judgment or in the supplemental judgment or in the amendment to the supplemental judgment, and it appears for the first time in the court's order entered August 23, 1954, and the appeals of the United States and Arenas were timely.

The record shows no detail as to why the advanced monies in the Eleuteria case were ordered distributed out of the trust funds in the court's registry. The briefs of the parties are but sketchy and do not agree with each other. If the Eleuteria case was as appellee's brief states it, that it was:

"* * * in reality, a part of the allotment proceeding and was integrated therewith,"

and we note that the trial judge so regarded it, and that the expenditure was a necessary and proper one,

"to make fully effective the judgment awarding the allotment of Guadaloupe Arenas to Lee Arenas * * *,"

as appellee claims it to be, we think the court was within its equitable powers in ordering it paid out of the trust funds. All intendments are presumed in favor a judgment upon subject matter within the jurisdiction of the trial court. There is nothing before us upon which we can hold that the court committed clear error as to this item or that the order in this particular is void.

The court's order appealed from is reversed and set aside as to interest on the attorney fees, and affirmed as to the payment of $468.19 from the court's registry for advances made in the Eleuteria Brown Arenas suit.

Reversed in part. Affirmed in part.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 314

JOHN W. PRESTON, OLIVER O. CLARK AND DAVID D. SALLEE, *Petitioners*

v.

UNITED STATES OF AMERICA AND LEE ARENAS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (Pet. App. 1-8) is reported at 232 F. 2d 77.

JURISDICTION

The judgment of the Court of Appeals, reversing in part the judgment of the District Court, was entered on February 23, 1956 (Pet. App. A., p. 1). A timely petition for rehearing was denied on May 21, 1956

(Pet. App. A., p. 1). The Petition for a writ of certiorari was filed on August 13, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In a suit under the Act of August 15, 1894, to determine an Indian's right to certain land allotments, the Indian claimant was successful. In supplemental proceedings the District Court assumed jurisdiction to make an award to the Indian's attorneys for their services and for advances in connection with the litigation, impressed a lien on the allotted lands to secure payment of the award, and ordered a portion of the allotment sold to satisfy the award. The proceeds of the sale were deposited in the registry of the court, subject to the same lien as was impressed on the land. The question presented is:

Whether the District Court had jurisdiction to allow interest on the attorneys' award from the fund which represents restricted Indian land.

STATUTE INVOLVED

The Act of August 15, 1894, 28 Stat. 286, 305, as amended by the Act of February 6, 1901, 31 Stat. 760, 25 U.S.C. 345, is as follows:[1]

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who

[1] The jurisdictional provisions of this Act were incorporated in the Judicial Code, sec. 24(24), 28 U.S.C. 41(24) (1940 ed.), which was identical in scope with the 1894 Act, as amended. *First Moon* v. *White Tail*, 270 U.S. 243, 245. They are now codified in 28 U.S.C. 1353.

claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, * * *.

STATEMENT

Invoking the 1894 Act (*supra*, pp. 2-3), Lee Arenas, a member of the Agua Caliente or Palm Springs Band of the Mission Indians, instituted proceedings in 1940 for the determination of his rights to trust patent allotments in the Palm Springs Indian Reservation at Palm Springs, California. After extended litigation, his rights to certain of the allotments were established.[2] Thereupon, his attorneys,

[2] The course of the litigation was briefly as follows: The Government's motion for summary judgment of dismissal was granted on March 6, 1942, and the dismissal was affirmed by the Court of

petitioners here, filed in the allotment proceeding a petition for a supplemental decree which would determine the amount of compensation for services rendered and the amount of costs and expenses paid by petitioners for which they had not been reimbursed by Arenas (R. 3). They sought a judgment against Arenas, a lien upon the lands to secure the amount of the judgment, and the sale of a portion of the allotted lands sufficient to satisfy the judgment. The United States challenged the jurisdiction of the court to enter any order which would in any way affect the restricted allotments, and urged that petitioners' relief be limited to a personal money judgment against Arenas.

The District Court rejected the Government's contentions and entered a judgment providing for recovery from Arenas of a sum equal to 22½% of the unascertained value of the allotted lands as fees for services rendered and an additional $258.67 as reimbursement for expenses incurred. A lien was impressed on the allotted lands to secure payment of the award. Upon appeal, the judgment was affirmed as

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Appeals in reliance upon the decision in *St. Marie* v. *United States*, 24 F. Supp. 237 (S.D. Cal.), affirmed, 108 F. 2d 876, certiorari denied because petition out of time, 311 U.S. 652. *Arenas* v. *United States*, 137 F. 2d 199 (C.A. 9). This Court reversed the judgment. *Arenas* v. *United States*, 322 U.S. 419. Upon trial, the District Court found Arenas to be entitled to four allotments claimed by him. *Arenas* v. *United States*, 60 F. Supp. 411 (S.D. Cal.) This judgment was affirmed by the Court of Appeals as to two allotments and reversed as to the other two. *United States* v. *Arenas*, 158 F. 2d 730 (C.A. 9). This Court, on June 9, 1947, denied petitions for writs of certiorari filed by both parties. *Arenas* v. *United States* and *United States* v. *Arenas*, 331 U.S. 842.

to the basic issue of the court's power to impress a lien upon the restricted Indian's allotment as security for the payment of the judgment and to sell the property to enforce such lien. The Court of Appeals recognized the Government's continuing interest in the allotted lands, but, relying upon *United States* v. *Equitable Trust Co.*, 283 U.S. 738, reasoned that by the 1894 Act Congress had impliedly consented to the exercise of all equitable processes which included the award of attorneys' fees and the sale of a portion of the property to satisfy the award. The Court of Appeals concluded, however, that the trial court had erred in failing to determine the dollar amount of the fees, and the judgment was reversed and the cause remanded for such a determination. *Arenas* v. *Preston*, 181 F. 2d 62 (C.A. 9), certiorari denied, 340 U.S. 819.

On remand, the District Court found that petitioners were entitled to $90,000 for their services to Arenas, and on April 6, 1951, entered a judgment in the total amount of $90,258.67 (R. 3-8). It was silent as to interest, but provided for the impressment of a lien and the sale of the allotted lands if petitioners were not fully compensated within six months. (R. 5-7). This judgment was affirmed in all respects on March 16, 1953 (R. 10). *United States* v. *Preston*, 202 F. 2d 740 (C.A. 9).

Thereafter, the judgment not having been paid, petitioners moved for an order for the sale of so much of the property as might be necessary to pay the judgment (R. 10). On August 10, 1953, a judgment was entered ordering that the property be sold within 30

days after October 24, 1953 (R. 8-14). This judgment provided that the award of $90,258.67 should bear interest at the rate of 7% per annum from April 6, 1951 (R. 12). The United States filed a motion for the deletion of the interest provision (R. 15), and on November 10, 1953, acting on the Government's motion, the District Court entered an order amending the judgment of August 10, 1953, to provide that the interest should run from October 6, 1951, rather than from April 6, 1951 (R. 18-19). No appeal was taken from either of these two orders.

The ordered sale of the allotted lands was several times postponed because of the pendency of negotiations by Arenas' private counsel for the private sale of several parcels of the allotments, and finally arrangements were completed for the private sale of three parcels at a total price of $123,845.00 (R. 25-44). On April 30, 1954, on stipulation by the parties, separate orders were entered with respect to each of the three parcels (R. 25-44). These orders provided that the lien of the judgment of April 6, 1951, be transferred from the lands to the net proceeds ($122,114.00) of the sale, which amount was deposited in the registry of the District Court, and also provided that the order of sale entered on August 10, 1953, should be "vacated and set aside and of no further force or effect" insofar as it affected the lands described in the order (R. 30-31, 37-38, 43). Still later, on July 8, 1954, another order was entered, also on stipulation, declaring that the order for sale should be deemed vacated (R. 44-45).

Thereupon, petitioner Preston filed a petition requesting the distribution from the fund on deposit of the moneys owing to the attorneys, including interest at the rate of 7% per annum from October 6, 1951 (R. 46-57). The United States again opposed the adding of interest (R. 57-61). However, on August 23, 1954, the District Court filed findings of fact and conclusions of law and a judgment upholding the claims of petitioners in all respects (R. 61-78). The interest which accrued from October 6, 1951, to July 26, 1954, was found to be $17,725.80 (R. 66). Pursuant to a stipulation, the principal amount due to the attorneys was ordered to be distributed immediately (R. 68-69, 75-76), but the amount of the accrued interest ($17,725.80) was ordered to be retained in the registry pending an appeal, with the further sum of $2,500.00 being retained to take care of interest on the interest in the event the appeal were unsuccessful (R. 76-77).

On appeal by the Government, petitioners contended *inter alia* that the order of sale entered on November 10, 1953 (modifying the order entered on August 10, 1953) was *res judicata* of the interest question (Pet. App. A., p. 5). The court below reversed the judgment insofar as it allowed interest, holding that, since restricted Indian lands were involved, the suit was in nature one against the United States, so that there was no jurisdiction to allow interest and consequently the claim of *res judicata* was without merit (Pet. App. A., pp. 5-7).

ARGUMENT

1. The decision of the court below denying the allowance of interest on a judgment from the proceeds of the sale of restricted Indian lands is plainly correct and does not involve any conflict with the decisions of this Court or of other Courts of Appeal. It is well settled that the United States has such an interest in restricted Indian lands and the proceeds of their sale that any suit involving those lands or proceeds is a suit against the United States. *Sunderland* v. *United States,* 266 U.S. 226, 234-235. *Minnesota* v. *United States,* 305 U.S. 382, 386-388; *United States* v. *Hellard,* 322 U.S. 363, 366-367. Consequently, it is only to the extent of the Government's consent that the fund in court may be subjected to adverse claims, and congressional consent to suit against the United States does not include consent to the imposition of interest unless the statute expressly so states. *United States* v. *Hotel Co.,* 329 U.S. 585; *United States* v. *N. Y. Rayon Co.,* 329 U.S. 654, 658-659; *United States* v. *Goltra,* 312 U.S. 203, 210-211; *Boston Sand Co.* v. *United States,* 278 U.S. 41. In determining whether it has the power to impose interest the court may not consider the equities. *United States* v. *N. Y. Rayon Co.,* 329 U.S. 654, 659-660; cf. *United States* v. *Gilbertson,* 111 F. 2d 978, 980 (C.A. 7). Nor does the invalid entry of an unconcerted judgment against the United States give any rights to the plaintiff. Even the "failure of officials to seek review [of an order void for lack of jurisdiction] cannot give force to this exercise of judi-

cial power." *United States* v. *United States Fidelity Co.*, 309 U.S. 506, 514.[3]

It is true that the court below has previously held that the 1894 Act was a consent to subject the allotted lands to the payment of fees to the attorneys who prosecuted the Indian's claims. *Arenas* v. *Preston*, 181 F. 2d 62 (C.A. 9), certiorari denied, 340 U.S. 819. But it does not follow that the lands, now represented by the fund in the court's registry, may be subjected to the payment of interest. As was stated in *Anglin & Stevenson* v. *United States*, 160 F. 2d 670, 673 (C.A. 10), certiorari denied, 331 U.S. 834, a case which the court below found to be "strikingly similar" (Pet. App. A., p. 6) and which petitioners ignore:

> But, consent of the United States to be bound by a judgment does not amount to an express consent that such judgment shall bear interest. When the judgment was entered and became final, the equitable jurisdiction of the court was exhausted. The imposition of interest on the judgment was not a part of the equitable process to which the Government expressly consented to be bound.

See also *Ickes* v. *Ledbetter*, 135 F. 2d 658, 662 (C.A. D.C.). The opinion in the *Anglin & Stevenson* case

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[3] Thus, as the court below held (Pet. App. A., p. 7), the order entered on November 10, 1953, could not be *res judicata* upon the interest question. See Pet. 12. Moreover, that order (R. 18-19) could not possibly be *res judicata* upon any issue. Standing alone, it is plainly not a "final" order, but must be read along with the order of August 10, 1953 (R. 8-14), which it serves to amend. Inasmuch as the order of August 10, 1953, was vacated on stipulation (R. 30-31, 37-38, 43, 44-45), it would seem that the order of November 10, 1953, was likewise ineffective for any purpose.

(160 F. 2d at p. 673) also serves to distinguish the holding in *Miller* v. *Robertson,* 266 U.S. 243, upon which petitioners chiefly rely (Pet. 6, 7, 15). And *Standard Oil Co.* v. *United States,* 267 U.S. 76, the only other case upon which petitioners rely which is even remotely in point, is adequately explained in *United States* v. *Worley,* 281 U.S. 339, 342.

2. If there is error in the disposition by the Court of Appeals of these supplementary proceedings initiated by petitioners, it lies in the holding that by the 1894 Act Congress had impliedly consented to the award of attorneys' fees and the sale of a portion of the allotted lands to satisfy such award. *Arenas* v. *Preston,* 181 F. 2d 62 (C.A. 9), certiorari denied, 340 U.S. 819; *United States* v. *Preston,* 202 F. 2d 740 (C.A. 9). Such holding was made despite the absence of any explicit language to that effect in the 1894 Act and contrary to the principle that, just as in the case of any other special jurisdictional act waiving the sovereign immunity from suit, a jurisdictional act for the benefit of Indians "is to be strictly construed and may not by implication be extended to cases not plainly within its terms." *Klamath Indians* v. *United States,* 296 U.S. 244, 250; *Blackfeather* v. *United States,* 190 U.S. 368, 376. The ruling, in the absence of which the interest question would not arise, also runs counter to express statutory restrictions, including the provision that the trust patent allotments were not to be "liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor." Act of June 21, 1906, 34 Stat. 325, 327, 25 U.S.C. 354. See also Section 5 of the General Al-

lotment Act of February 8, 1887, 24 Stat. 388, 389, 25 U.S.C. 348; Section 5 of the Mission Indian Act of January 12, 1891, 26 Stat. 712, 713; Section 6 of the General Allotment Act as amended by the Act of May 8, 1906, 34 Stat. 182, 25 U.S.C. 349; Act of June 21, 1906, 34 Stat. 325, 327, 25 U.S.C. 410. Such restrictions on the disposition of Indian allotments are not to be lightly disregarded. *United States* v. *Rickert,* 188 U.S. 432; *Heckman* v. *United States,* 224 U.S. 413, 447; *Starr* v. *Long Jim,* 227 U.S. 613, 625; *Mullen* v. *Simmons,* 234 U.S. 192; *Drummond* v. *United States,* 324 U.S. 316.

The government has not sought review of this portion of the judgment below, but we refer to it here because, in our view, this even reveals another reason why petitioners' contention is meritless.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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